St. John's Law Review

Volume 32
Number 1 *Volume 32, December 1957, Number 1*

Article 14

May 2013

Constitutional Law--Military Law--Trial of Military Dependents Overseas by Court-Martial in Capital Cases Held Unconstitutional (Reid v. Covert, 354 U.S. 1 (1957))

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CONSTITUTIONAL LAW—MILITARY LAW—TRIAL OF MILITARY DEPENDENTS OVERSEAS BY COURT-MARTIAL IN CAPITAL CASES HELD UNCONSTITUTIONAL.—A military court-martial, taking jurisdiction under Article 2(11) of the Uniform Code of Military Justice,[1] convicted civilian dependents for the murders of their husbands overseas. On a rehearing of consolidated habeas corpus proceedings, the United States Supreme Court reversed its previous decision and *held* that the trial by court-martial in capital cases in times of peace of dependent-wives accompanying their soldier-husbands overseas is unconstitutional. *Reid v. Covert,* 354 U.S. 1 (1957).

It seems well established that a sovereign has jurisdiction over all persons within its borders.[2] However, by a series of treaties with numerous foreign countries, most of which are members of the North Atlantic Treaty Organization, the United States has acquired primary jurisdiction over civilian dependents accompanying the armed forces overseas.[3]

Article 2(11) is an outgrowth of Article 2(d) of the Articles of War passed by Congress in 1916.[4] The instant cases mark the first time the Supreme Court passed upon the constitutionality of this provision.[5] Its validity had previously been upheld by lower federal courts [6] and the United States Court of Military Appeals.[7]

On the first hearing of the cases, the majority of the Court [8] did not consider the often repeated rule that the power of Congress to establish "legislative" courts,[9] such as military courts-martial, must be related to some pertinent enumerated power. These "legislative" tribunals have been upheld as valid exercises of the congressional power to govern territories;[10] to regulate foreign commerce;[11] and to implement treaties.[12] In every case, the Supreme Court examined the appropriateness of a "legislative" court in relation to the exercise of a particular power. Therefore, it would seem that the Court was incorrect in predicating its decision on an isolated power to create

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[1] 64 STAT. 109 (1950), 50 U.S.C. § 552(11) (1952).

[2] Kinsella v. Krueger, 351 U.S. 470, 479 (1956).

[3] See, *e.g.,* Administrative Agreement under Article III of the Treaty Between the United States of America and Japan, Feb. 28, 1952, 3 U.S. TREATIES & OTHER INT'L AGREEMENTS 3341, T.I.A.S. No. 492 (effective April 28, 1952); North Atlantic Treaty Status of the Forces Agreement, June 19, 1951, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1792, T.I.A.S. No. 2846 (effective Aug. 23, 1953).

[4] Articles of War, 1916, 39 STAT. 651.

[5] Reid v. Covert, 354 U.S. 1, 3 (1957).

[6] See, *e.g.,* Mobley v. Handy, 176 F.2d 491 (5th Cir. 1949); *Ex parte* Gerlach, 247 Fed. 616 (S.D.N.Y. 1917).

[7] See United States v. Burney, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956).

[8] Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956).

[9] *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929).

[10] American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 685 (1828).

[11] *Ex parte* Bakelite Corp., *supra* note 9, at 458.

[12] *In re* Ross, 140 U.S. 453 (1891).

"legislative" courts, without considering the question whether an enumerated power existed for which their creation may be necessary and proper.

On the second hearing, the majority opinion,[13] written by Justice Black, recognized that the Constitution grants Congress power to make all rules ". . . necessary and proper . . ." to govern and regulate those persons who are serving in the ". . . land and naval Forces. . . ." [14] Under this majority view, however, the "necessary and proper" clause cannot operate to extend jurisdiction to any group of persons beyond that class described in clause 14—the land and naval forces.[15]

Justice Harlan, concurring, as well as the two dissenting justices, appear to agree with Justice Frankfurter that ". . . 'it is a *constitution* we are expounding.'" [16] Therefore, all the provisions of the Constitution must be read together. For them the question is whether civilian dependents are so closely related to what Congress may allowably deem essential for the effective regulation of the armed services that they may be subjected to courts-martial jurisdiction in these capital cases, when the consequence is loss not only of the protections afforded by Article III of the Constitution, but also the fifth and sixth amendments. They differed as to how closely dependents were related to military operations.[17]

The dissenting justices contended that two policy considerations justified congressional power to enact Article 2(11): the network of ties binding the civilian to an identifiable military community; and the necessity of maintaining order and discipline among such civilians to prevent any impairment of the military mission.[18] These arguments, however, seem to avoid the question as to what is the appropriate method of maintaining order in military camps.

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[13] Chief Justice Warren, and Justices Douglas and Brennan concurred in the opinion of Justice Black. Justices Frankfurter and Harlan concurred in separate opinions, while Justice Clark dissented in an opinion in which Justice Burton joined.

[14] U.S. CONST. art. I, § 8, cl. 14.

[15] Reid v. Covert, 354 U.S. 1, 20-21 (1957). However, Justice Black realizes that *some* civilians might be construed to be part of the armed services for purposes of clause 14. *Id.* at 23.

[16] Reid v. Covert, 354 U.S. 1, 43 (1957) (concurring opinion), citing McCulloch v. Maryland, 4 U.S. (4 Wheat.) 415, 422 (1819).

[17] The Supreme Court would apparently draw a distinction between civilians having functional connections with the military and those having merely social ties. The former would include employees on whom rested an affirmative duty of contributing to the military operation. Civilian dependents would be considered as having merely social ties. See Reid v. Covert, 354 U.S. 1, 22-23 (1957).

[18] ". . . [T]he inability of the military authorities to deal decisively with the conduct of camp followers, and other 'accompanying' persons . . . might adversely affect military operations and morale. . . . However, the service concerned cannot successfully deter such depredations by persons as to whom it lacks power to punish." United States v. Garcia, 5 U.S.C.M.A. 88, 100, 17 C.M.R. 88, 100 (1954).

While Justice Black's opinion indicates that courts-martial of civilian dependents for *all* crimes is unconstitutional,[19] Justice Frankfurter strictly limits himself to the facts of the case. He did state, though, that "the taking of life is irrevocable" [20] and that:

> It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.[21]

Justice Harlan specifically concurs ". . . on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents." [22] He argues:

> In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority.[23]

The instant case poses a difficult question: how to try military-connected civilians accused of crimes in foreign lands. To suspend completely the practice of allowing dependents to accompany military forces abroad would undoubtedly be bad for military morale. Yet it is imperative that a solution be found to the problem raised by the Court's decision in order that there will be no "crime without punishment." Among the possible solutions are: constitutional amendment; trial of such civilians by the foreign jurisdiction, as is the case with American tourists; trial of such civilians in the United States; or the establishment of civilian courts overseas.

CRIMINAL PROCEDURE — INSTRUCTIONS TO JURY — FAILURE TO ANSWER JURYMEN'S QUESTION HELD NOT NECESSARILY REVERSIBLE ERROR.—Defendant was convicted on counts of kidnapping and felony murder. Although his sole defense was insanity, the trial judge failed to answer the jury's question as to whether they must find for defendant if they believed him to have been insane part of the time during the commission of the crime. Section 427 of the New York Code of Criminal Procedure provides that information on a point of law desired by the jury must be given in open court.[1] The Court

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[19] Reid v. Covert, 354 U.S. 1, 7 (1957).
[20] *Id.* at 45 (concurring opinion).
[21] *Id.* at 45-46 (concurring opinion).
[22] *Id.* at 65 (concurring opinion).
[23] *Id.* at 77 (concurring opinion).

[1] "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct